IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0393
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
MYRON DALE FERLANTO,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20060847

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Diane Leigh Hunt — Tucson
Attorneys for Appellee

Meredith Little — Tucson
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 A jury found Myron Dale Ferlanto guilty of two counts each of armed robbery, aggravated assault with a deadly weapon or dangerous instrument, and first-degree burglary.[1] The trial court sentenced him to mitigated, 8.5-year prison terms for the armed robberies and presumptive, 7.5-year prison terms for the aggravated assaults and burglaries, all terms to be served concurrently. On appeal, Ferlanto argues the trial court abused its discretion by refusing to give a *Willits*[2] instruction, limiting the scope of his cross-examination of one of the state's primary witnesses, and not sanctioning the state for discovery violations. For the following reasons, we affirm.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). On December 5, 2005, Daniel D. was working at a convenience store on Wilmot Road. At 1:49 a.m., a man entered the store with a gun and told Daniel to give him the money in the cash register or he would kill him. Daniel gave the man approximately $35 and he left. At 2:35 that same morning, a man entered a convenience store on 22nd Street with a gun. He told the store clerk, Anna F., to give him the money in the cash register, and when she did not do so, he fired two shots. One bullet struck a cigarette display behind Anna, and the other bullet struck the counter near her hand. After she gave the man approximately $35, he left the store. Based on

[1]He was also charged with one count of possession of a deadly weapon by a prohibited possessor, but that charge was severed from this case before trial.

[2]*State v. Willits,* 96 Ariz. 184, 393 P.2d 274 (1964).

photographs obtained from the stores, the same man appeared to have been the perpetrator in both incidents.

¶3 In February 2006, after the robber's photograph had been broadcast on television, police received information that Ferlanto had committed the robberies. During the investigation that followed, Tucson Police Detective Bradley Hunt spoke to William Bunning, with whom Ferlanto was living at the time. Bunning identified Ferlanto from the robbery pictures Hunt had showed him and told Hunt that Ferlanto had told him he had committed the robberies. Ferlanto was arrested, and during a subsequent search of his father's residence, police found a blue and white hooded jacket, which appeared to be the same jacket the perpetrator had worn in the first robbery.

Discussion

A. *Willits* instruction

¶4 Ferlanto first argues the trial court abused its discretion by denying his request for a *Willits* instruction on the ground that the state failed to preserve a videotape of the second robbery. We review a trial court's decision to grant or deny a *Willits* instruction for an abuse of discretion. *State v. Davis*, 205 Ariz. 174, ¶ 36, 68 P.3d 127, 133 (App. 2003).

¶5 A *Willits* instruction allows the jury to infer that missing evidence would have exculpated the defendant and is appropriate "[w]hen police negligently fail to preserve potentially exculpatory evidence." *State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999). However, to be entitled to the instruction, the defendant must show, "(1) that the

state failed to preserve material evidence that was accessible and might tend to exonerate him, and (2) resulting prejudice." *Id.* Here, Ferlanto has failed to establish that the police failed to preserve the videotape or that he was prejudiced by its absence.

¶6 A video camera in the 22nd Street store recorded the robbery. On the morning of the robbery, the store manager and Officer Blaylock both viewed the videotape, and Blaylock requested a copy of the tape. It could not be copied then, so Blaylock instructed the manager to call 911 once the tape had been copied so that an officer could pick it up. The manager testified she had copied the video the following day, and an officer had picked it up. However, police officers testified the video never was picked up.

¶7 At trial, Ferlanto argued that, had the videotape been preserved, it might have exonerated him because it tended to show the robber was not carrying a gun. He asked the trial court to give the jury a *Willits* instruction because there was some evidence that someone from the Tucson Police Department (TPD) had picked up the tape and that TPD had subsequently "lost or destroyed" it. The trial court denied Ferlanto's motion, finding he had not proven that "the State failed to preserve materials and reasonably accessible evidence having a tendency to exonerate him, or that the failure to do so . . . resulted in prejudice." We agree.

¶8 There was conflicting testimony about whether the tape had ever been in TPD's possession. But, in making its ruling, the court noted it "still [did not] know whether or not Tucson Police Department picked up the tape. [The manager] believes they did, the police

officers say they didn't. There was . . . nothing in any report nor was anything entered into evidence on property sheets that would indicate that they picked it up." On this record, we cannot say the trial court abused its discretion in concluding Ferlanto failed to demonstrate that the state had "allow[ed] evidence within its control to be destroyed." *State v. Atwood*, 171 Ariz. 576, 627, 832 P.2d 593, 644 (1992), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229, ¶ 25, 25 P.3d 717, 729 (2001).

¶9 Furthermore, Ferlanto has not established he was prejudiced by the fact that the tape was not produced. The manager and Officer Blaylock testified about what they had seen on the video. Both said the video was taken from a vantage point behind the robber, and from that perspective, no gun was visible and there was no indication that shots had been fired. However, still photographs were admitted into evidence that showed the perpetrator's face and that he was carrying a gun, and Anna testified the robber had wielded a gun and fired it during the robbery. Furthermore, both she and Daniel identified Ferlanto at trial as the person who had committed the robberies. The record does not support Ferlanto's argument that the videotape would have tended to exonerate him. Ferlanto has failed to demonstrate either that the state lost or destroyed evidence in its possession or that he suffered prejudice. Therefore, the trial court did not abuse its discretion in denying his request for a *Willits* instruction.

B. Limitation of Cross-Examination

¶10 Ferlanto next claims the trial court abused its discretion by limiting his cross-examination of one of the state's primary witnesses. At trial, Ferlanto's strategy was apparently to demonstrate that Bunning, a crucial state witness, had sold methamphetamine and was generally untrustworthy. However, during voir dire, the court denied Ferlanto's request to question prospective jurors on their views about drug users. The court noted that any voir dire on that issue might permit the state to introduce evidence of Ferlanto's own methamphetamine involvement, which could prejudice him and potentially give rise to a claim of ineffective assistance of counsel. Ferlanto did not pursue this line of questioning on cross-examination of Bunning.

¶11 As best we understand Ferlanto's argument, he appears to contend that because the trial court precluded voir dire on the jurors' perceptions of drug users, he was effectively precluded from cross-examining Bunning about his drug involvement.[3] Because Ferlanto did not raise any objection below to this perceived limitation of cross-examination, we review for fundamental error. To succeed on fundamental error review, the defendant must show fundamental error occurred and that it caused him prejudice. *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005). Fundamental error is "'error going to the

[3]The state contends this is, in actuality, a claim of ineffective assistance of counsel, which may not be raised on appeal. *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2005). It is not entirely clear whether Ferlanto is also challenging counsel's failure to pursue this line of questioning, but to the extent he is, we agree the claim may only be raised in post-conviction relief proceedings pursuant to Rule 32, Ariz. R. Crim. P. *See id.*

foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.* ¶ 19, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984).

¶12 Ferlanto has not established error occurred, much less fundamental error. He concedes that "the [court] stated for the record that [it] was not precluding any defense." After voir dire was completed, the court stated:

> I just want to make the record clear . . . I am not precluding you from introducing any defense that you think is appropriate for your client. I merely wanted to, and did quite emphatically state what I felt about the possibility of Mr. Ferlanto being prejudiced by the introduction of certain evidence, but you are clearly not precluded from doing anything that you think is appropriate to represent your client.

Thus, we do not see how the court's ruling on the questioning of prospective jurors could be construed as a limitation on Ferlanto's cross-examination of Bunning. *See State v. Harris*, 151 Ariz. 236, 237, 727 P.2d 14, 15 (1986) (defendant not prevented from presenting defense when defense counsel chooses, based on pretrial ruling, not to pursue particular defense).[4]

C. Discovery Sanction

¶13 Finally, Ferlanto argues the trial court abused its discretion by denying his motion for sanctions for failure to timely provide discovery concerning contact information

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[4]In his reply brief, Ferlanto recasts his argument as the trial court's interference with his attorney-client relationship. However, he makes this claim for the first time in his reply brief and does not support it with any authority. We therefore decline to consider it. *See* Ariz. R. Crim. P. 31.13(c)(3); *see also State v. George*, 206 Ariz. 436, n.3, 79 P.3d 1050, 1057 n.3 (App. 2003).

for Bunning. He contends his inability to interview Bunning until the day Bunning testified at trial prejudiced his defense because he was unable to "pursue further discovery, . . . make timely pretrial motions and . . . prepare for trial properly." He therefore argues the trial court should have precluded Bunning's testimony as a sanction for the state's discovery violation.

¶14 Before trial, Ferlanto brought discovery issues to the court's attention on three separate occasions. After a hearing on Ferlanto's first motion to compel disclosure, the court ordered the state to provide the particular discovery items and coordinate with defense counsel to schedule witness interviews. The court also noted that if Ferlanto did not receive the disclosure by the date ordered, it would "consider appropriate sanctions." At a hearing on Ferlanto's second motion to compel, held a little more than a month later, Ferlanto claimed he still had not received part of the court-ordered disclosure. Although Ferlanto also complained about his inability to interview Bunning, he specifically stated that he was not seeking to preclude Bunning's testimony as a remedy for any discovery violation. At that time, the court suggested that Ferlanto attempt to interview Bunning telephonically, but Ferlanto did not request, and the court did not impose, sanctions on this issue. Finally, the day before trial, during the time scheduled for a motion to suppress, the court asked about the pending discovery issues. Defense counsel stated there was no need to revisit the motion to compel and, although she still had been unable to reach Bunning, "it would be fine if [she] spoke to him before trial." The interview was conducted before Bunning testified on the second day of trial.

¶15 Rule 15.7, Ariz. R. Crim. P., provides that when a party fails to comply with the discovery rules or court-ordered discovery, the court "shall impose any sanction it finds appropriate." Ferlanto claims the trial court should have *sua sponte* precluded Bunning's testimony as a sanction against the state for failing "to produce its chief witness until a few minutes before he was to testify, despite repeated efforts by defense counsel to obtain an interview." But Ferlanto ignores that he expressly stated he was not seeking the preclusion of Bunning's testimony as a sanction, and the day before trial, he told the court that Bunning's availability for an interview was no longer an issue. A "[d]efendant cannot take his chances on a favorable verdict, reserving the 'hole card' of a later appeal on an evidentiary matter that was curable at trial, and then seek appellate reversal from an unfavorable verdict." *State v. Valdez*, 160 Ariz. 9, 13-14, 770 P.2d 313, 317-18 (1989). Therefore, we review the court's failure to preclude the state from calling Bunning as a witness for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶16 We are unable to determine from the record precisely when the state disclosed Bunning's contact information. But it is evident from the transcript of the hearing on Ferlanto's second motion to compel that the information had, by that time, been disclosed, and Ferlanto had been unable to contact him. The state had apparently provided contact information for Bunning in Kansas City, Missouri, but according to defense counsel, he had recently been seen in Tucson. However, at no time did Ferlanto suggest that the state had

failed to provide him with appropriate contact information or otherwise interfered with his attempts to interview Bunning. Despite Ferlanto's argument on appeal to the contrary, he suggested that Bunning's true whereabouts were "not in keeping with what the prosecutor is being told." *See State v. Meza*, 203 Ariz. 50, ¶ 32, 50 P.3d 407, 414 (App. 2002) (before suppressing evidence for discovery violation, court should consider whether conduct motivated by bad faith). Ferlanto has not established that the state failed to comply with its discovery obligations concerning Bunning. There was therefore no error, fundamental or otherwise, in the trial court's failure to sanction the state by precluding his testimony.

Disposition

¶17 For the reasons set forth above, we affirm.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge